

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

THE MCPHERSON BUILDING
901 FIFTEENTH STREET, N.W., SUITE 1100

WASHINGTON, D.C. 20005

(202) 682-3500

TELECOPY NUMBER
(202) 682-3580

RECEIVED

MAY - 7 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ADMIRALTY CENTRE
TOWER 1, 32nd FLOOR
18 HAR COURT ROAD
HONG KONG
(852) 865 7676
PARE DE MEÛS 30
1040 BRUSSELS BELGIUM
(322) 514 4300

425 PARK AVENUE
NEW YORK, N.Y. 10022
(212) 836 8000

1999 AVENUE OF THE STARS
SUITE 1600
LOS ANGELES, CA 90067
(213) 788 1000

WRITERS DIRECT DIAL NUMBER

(202) 682-3526

May 7, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Amendment of Table of FM Allotments
New Port Richey, Sarasota, and
Sebring, Florida
(MM Docket No. 93-65, RM-6869)

Dear Ms. Searcy:

Submitted herewith for filing, on behalf of our client, WGUL-FM, Inc., licensee of Radio Station WGUL(FM), New Port Richey, Florida, are an original and five (5) copies of its Petition For Reconsideration in connection with the above-referenced rulemaking proceeding.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS and HANDLER

By: 

Irving Gastfreund

Enclosures

No. of Copies rec'd 015
LIBA CODE

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

MAY - 7 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Amendment of Section 73.202(b)
of the Commission's Rules,
Table of Allotments,
FM Broadcast Stations
(New Port Richey, Sarasota and
Sebring, Florida))

MM Docket No. 93-65
RM-6869

To: Chief, Allocations Branch,
Policy and Rules Division,
Mass Media Bureau

PETITION FOR RECONSIDERATION

WGUL-FM, INC. ("WGUL"), licensee of Radio Station WGUL-FM, New Port Richey, Florida, by its attorneys, pursuant to Sections 1.106 and 1.429 of the Commission's Rules, hereby respectfully requests reconsideration of that portion of the Notice of Proposed Rule Making, ___ FCC Rcd ___, DA 93-281 (Mass Media Bureau released April 8, 1993) ("NPRM") released in the above-captioned proceeding by the Chief of the Allocations Branch of the Mass Media Bureau's Policy and Rules Division, in which the Bureau denied WGUL's November 29, 1988 request that the Commission institute a rulemaking proceeding contemplating substitution of Channel 288C2 for Channel 288A in New Port Richey, Florida, and modification of the license of WGUL-FM to specify operations on the new Channel 288C2 in New Port Richey. In support whereof, it is shown as follows:

1. On November 29, 1988, WGUL filed its Petition For Rulemaking and Request For Issuance Of Order To Show Cause in this proceeding. WGUL therein petitioned the Commission to amend

Section 73.202(b) of the Commission's Rules (Table of FM Allotments) to: (a) substitute Channel 288C2 for Channel 288A in New Port Richey, Florida, and to issue an order to show cause why the license for Radio Station WGUL-FM should not be modified to specify operations on the new Channel 288C2 in New Port Richey in lieu of operations on Channel 288A; (b) substitute Channel 282A in lieu of Channel 288A in Sarasota, Florida, and issue an order to show cause why the license for Radio Station WKZM(FM) in Sarasota should be not modified to specify operations on Channel 282A in Sarasota rather than on Channel 288A in that community; and (c) substitute Channel 289A in lieu of Channel 288A in Sebring, Florida, and issue an order to show cause why the license for Radio Station WCAC(AM) in Sebring should not be modified to specify operations on Channel 289A in Sebring rather than on Channel 288A in that community. Comments in support of WGUL's Petition For Rulemaking were filed with the Commission on December 5, 1988 by Christian Fellowship Mission, Inc. ("CFM"), licensee of Radio Station WKZM(FM), Sarasota, Florida. Comments in support of the WGUL Petition For Rulemaking was filed with the Commission on December 16, 1988 by Roper Broadcasting, Inc.

requested in the WGUL Petition For Rulemaking, then, as an alternative, WGUL-FM should be upgraded to Class C3 status on Channel 288 in New Port Richey, Florida.

3. As noted in WGUL's Petition For Rulemaking, WGUL's proposal to upgrade WGUL-FM to Class C2 status on Channel 288C2 in New Port Richey, Florida, required a modification of license of WCAC(FM) in Sebring, Florida, to specify operations on Channel 289A in that community. In order for the latter channel change to comply with all applicable Commission mileage separations, WGUL noted, in its rulemaking petition, that WCAC(FM) would have to relocate its transmitter site. On November 28, 1988, WGUL and Roper entered into an Agreement contemplating such a site relocation for WCAC(FM), and a copy of that Agreement was filed with the Commission in this proceeding by WGUL on December 16.

Park, Florida, be changed from Channel 292A to Channel 256A. As a consequence of the foregoing, it was unnecessary for WGUL to specifically propose, in its rulemaking petition, that the license of Radio Station WWOJ(FM), Avon Park, Florida, be modified so as to specify operations on Channel 256A in Avon Park, in lieu of Channel 292A in that community, since the Commission had already specifically proposed such a change in MM Docket No. 87-455. Hence, since it was unnecessary to request allotment of Channel 256A to Avon Park and modification of the license of WWOJ(FM) to specify operations on that channel, and since one or more of the parties in MM Docket No. 87-455 had already proposed such changes and were obligated, under Commission policy, to represent that they would reimburse the licensee of WWOJ(FM) for the proposed change in the station's channel, it was unnecessary for WGUL to specifically propose that it would reimburse the licensee of WWOJ(FM) for its reasonable costs in switching channel from Channel 292A to Channel 256A in Avon Park.

5. As recently as April 29, 1992, the Commission made it clear in MM Docket No. 87-455 that there was no impediment to the modification of WWOJ(FM)'s channel from Channel 292A to Channel 256A, and that the issuance by the Commission of a formal order to show cause was not required to accomplish the channel change. Thus, In Order To Show Cause In MM Docket No. 87-455, 7 FCC Rcd 2642 (Mass Media Bureau 1992), the Mass Media Bureau specifically

noted that the licensee of WWOJ(FM) had consented to a transmitter site relocation and substitution of the station's channel from Channel 292A to Channel 256A, and that, for this reason, the Commission did not find it necessary to issue an order to show cause directed to the licensee of WWOJ(FM). 7 FCC Rcd 2642 n. 2.

6. Unfortunately, the Commission's plan to change WWOJ's channel from Channel 292A to Channel 256A has not yet been implemented. On March 29, 1993, the commission released its Report and Order in MM Docket No. 92-195, 8 FCC Rcd 2197 (Mass Media Bureau 1993), involving FM channel allotments in Beverly Hills, Chiefland, Holiday, Micanopy and Sarasota, Florida. In Paragraph 10 of that Report and Order in the Beverly Hills proceeding, the Mass Media Bureau appeared to suggest that, in light of the grant of channel upgrades in the Beverly Hills proceeding, a number of appeals or reconsideration requests pending in MM Docket No. 87-455 may be moot and that, therefore, MM Docket No. 87-455 can now be terminated. In the Beverly Hills Report and Order, the Bureau granted a channel upgrade for WLVU(FM), Holiday, Florida, but not on Channel 292C2, as had been contemplated in MM Docket No. 87-455; rather, the upgrade of WLVU's channel to Class C2 status was on Channel 245C2 in Holiday, Florida.

7. Thus, it appears, from the Report and Order in the Beverly Hills proceeding, that the Bureau is prepared to terminate as moot MM Docket No. 87-455 with respect to the WLVU(FM) channel upgrade. If the Bureau were to terminate MM Docket No. 87-455 as moot, WWOJ(FM) would still remain on Channel 292A in Avon Park, rather than moving to Channel 256A. To date, the Commission has not terminated proceeding in MM Docket No. 87-455.

8. More importantly, on April 19, 1993, Highlands Media Company, Inc., licensee of WWOJ(FM), Avon Park, Florida, filed supplementary Comments in MM Docket No. 87-455. Highlands Media Company, Inc., therein made clear that, notwithstanding the Bureau's actions in the Beverly Hills, Florida proceeding, it still desired the substitution of Channel 256A in lieu of Channel 292A in Avon Park and the modification of WWOJ(FM)'s license to specify operations on Channel 256A. Highlands Media Company, Inc., demonstrated in its Comments that the Avon Park channel substitution has substantial independent public interest value and deserves consideration on its own merits. Importantly, Highlands Media Company, Inc., emphasized in its April 19, 1993 Comments, as follows:

"Highlands understands that, given the Commission action in Docket 92-195 [i.e., the Beverly Hills proceeding] the Avon Park channel substitution is no longer a pre-condition for the Holiday upgrade. Highlands therefore agrees not to invoke the Commission's processes under Circleville, Ohio, 8 FCC

2d 159 (1967), to seek reimbursement of its expenses for changing to Channel 256A."

Comments of Highlands Media Company, Inc., at 3 n.4.

In light of the April 19, 1993 Comments of Highlands Media Company, Inc., in MM Docket No. 87-455, that rulemaking proceeding is not moot. Moreover, in light of the clear statement of Highlands Media Company, Inc., in its April 19, 1993 Comments in MM Docket No. 87-455 to the effect that it is willing to waive invocation of the Commission's reimbursement policy, under Circleville, Ohio, supra, it is manifest that WGUL was not required, and is not required, to specifically propose substitution of Channel 256A for Channel 292A in Avon Park, nor is WGUL required (nor was it required) to propose to reimburse the licensee of WWOJ(FM) for its reasonable costs incurred in connection with such a channel change.

9. Notwithstanding the foregoing, in footnote 1 of is April 8, 1993 NPRM in this proceeding, the Mass Media Bureau denied WGUL's request for institution of a rulemaking proceeding contemplating an upgrade of WGUL-FM to Class C2 status on Channel 288 in New Port Richey. The Bureau therein stated as follows:

"Petitioner also filed a petition for rule making requesting the substitution of Channel 288C2 for Channel 288A at New Port Richey. This proposal requires the substitution of Channel 289A for Channel 288A at Sebring, Florida. This proposal is unacceptable for consideration because Channel 289A at Sebring would be short-spaced to Station WWOJ, Channel 292A, Avon Park, Florida."

10. In light of all the facts set forth above, and particularly in light of the unequivocal statements by the licensee of WWOJ(FM) in its April 19, 1993 Comments in MM Docket No. 87-455, there is no rational basis for the Mass Media Bureau's determination that WGUL's Channel C2 upgrade proposal for WGUL-FM is unacceptable. To the extent that the Bureau's rejection of the WGUL Channel C2 upgrade proposal was predicated on WGUL's failure to specifically propose substitution of Channel 256A for Channel 292A in Avon Park, Florida, such a proposal by WGUL was unnecessary, for the reasons set forth above, since the proposal was already planned by the Commission. To the extent that the Bureau's rejection of WGUL's Channel C2 upgrade proposal for WGUL-FM was predicated on WGUL's failure to propose reimbursement of WWOJ(FM)'s reasonable expenses incurred in switching channels, WGUL was not required to propose such reimbursement since, as noted above, one or more of the parties in MM Docket No. 87-455 were obligated to make such reimbursement, and since the licensee of WWOJ(FM) has now clearly advised the Commission that it seeks the WWOJ(FM) channel change in MM Docket No. 87-455 regardless of whether it obtains reimbursement of expenses through the Commission's processes.

11. In light of all the foregoing, the Bureau's rejection of WGUL's proposal to institute rulemaking proceedings contemplating upgrade of WGUL-FM's channel to Class C2 status was

arbitrary, capricious and an abuse of discretion. Accordingly, it is respectfully requested that such rejection be expeditiously reconsidered and vacated, and that the WGUL Channel C2 upgrade proposal be set for rulemaking expeditiously and consolidated in this proceeding.¹

Respectfully submitted,

WGUL-FM, INC.

By: 

Irving Gastfreund

Kaye, Scholer, Fierman, Hays &
Handler

The McPherson Building

901 15th Street, N.W.

Suite 1100

Washington, D.C. 20005

(202) 682-3526

Its Attorneys

May 7, 1993

¹

Unquestionably, the Bureau's rejection of WGUL's Channel C2 upgrade proposal for WGUL-FM in footnote 1 of the Bureau's NPRM in this proceeding was a final action with respect to that proposal by WGUL. Accordingly, the instant Petition For Reconsideration is properly before the Bureau, pursuant to Sections 1.106 and 1.429 of the Commission's Rules, since, as noted above, such rejection by the Bureau does not represent interlocutory action with respect to the Channel C2 upgrade proposed proffered by WGUL.

CERTIFICATE OF SERVICE

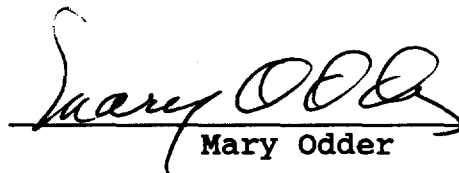
I, Mary Odder, a secretary in the law firm of Kaye, Scholer, Fierman, Hays & Handler, hereby certify that on this 7th day of May, 1993, have caused a copy of the foregoing "Petition For Reconsideration" to be sent via U.S. mail, postage prepaid, or be hand-delivered to the following:

Michael C. Ruger, Esq.*
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 8322
Washington, D.C. 20554

Ms. Nancy Walls*
Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 8317
Washington, D.C. 20554

Mr. Robert T. Rowland, Sr.
President
Roper Broadcasting, Inc.
Radio Station WCAC(FM)
2355 Pluckebaum
Cocoa, Florida 32926

Mr. Lowell A. Brubaker
President
Christian Fellowship Mission
P.O. Box 7627
Sarasota, Florida 34278



Mary Odder